No. 11828

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SEATTLE STAR, INC., a corporation, and E. L. SKEEL, Liquidating Trustee,

Appellants,

v.

JOHN RANDOLPH and PHILIP W. TAYLOR,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

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PETITION FOR REHEARING

Under authority of Rule 25, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellees, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, hereby respectfully petitions this Honorable Court for a rehearing in the above-entitled cause, the

judgment of reversal in which was filed in this court May 26, 1948.

The petition is filed for the following reasons, and upon the following grounds:

I.

On page 2 of the opinion it is said:

> "Sec. 308(c) does not require that employers afford to returning veterans, *as distinguished from non-veterans*, any specific benefits in the nature of insurance or severance pay. It provides only for the participation by re-employed veterans in those insurance and other benefits 'offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces'." (Italics ours.)

It was not intended to apply to anybody but veterans!

The Court then sets out Clauses 4 and 6 of Article VIII of the contract.

Clause 4 reads:

> "In computing severance pay the length of service of the employee shall be the total years of full-time continuous employment by the Seattle Star."

The Court neither gives effect to nor even mentions the first two lines and a half of Clause 6 from which it quotes. That clause (section) reads:

> "*By written agreement* with the publisher, employees may be granted leaves of absence without prejudice to continuing service in the determination of severance pay, but time spent on *such leave* shall not count as service time."

It is a strained construction to hold that the words "time spent on *such leave* (leave of absence) shall not count as service time" has anything whatever to do with any kind of a leave of absence save and except that accomplished by "*written agreement*" with the publisher, as so plainly set forth in the unambiguous language used.

Article X of the contract clearly supports this contention because it deals only with *military service* "which takes him out of the employment of the publisher."

That article deals exclusively with the subject matter of this litigation and the language used by the contracting parties is that such employee "*shall be granted a leave of absence* * * * (Ex. B) *with dismissal-pay rating* and other rights under the contract *unimpaired.*" (Ex. C)

This case deals with nothing but *dismissal-pay rating*, which the contract says in unmistakable language shall be "*unimpaired,*" by reason of the employee being required under the law to give up his job and shoulder a gun in the defense of his country.

In the case of *Fishgold v. Sullivan Drydock & Rep. Corp.*, 328 U.S. 275, the Supreme Court of the United States, speaking through Mr. Justice Douglas said:

> "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of greatest need. See *Boone v. Lightner*, 319 U.S. 561, 575, 63 S. Ct. 1223, 1231, 87 L.Ed. 1587. And no practice of employer or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured to the veteran under the Act."

and further

> "As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the seniority he had; *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*" (Italics ours)

Had it been the intention of the parties to the union contract that clauses 4 and 6 of Article VIII were to control the provisions of Article X, we would expect to at least find some such indication therein. But there is no such indication to be gathered from any of the words used. On the contrary, a very clear indication is to be gathered from an examination of the original Article X contained in the contract in effect from October 5, 1940 to October 4, 1942 (Ex.

B), and the new Article X in the subsequent contract. It was first therein provided:

> "The publisher agrees that all employees who leave their jobs to serve in the armed forces * * * shall be granted a leave of absence * * * that such employee (who leaves his job to serve in the armed forces) shall then (after his discharge from military service) be reinstated to the same or comparable position with severance-pay rating and other rights under this agreement unimpaired *except that such leave may be deducted in computing severance pay.*"

In the subsequent contract (Ex. C) the italicized words of the above-quoted Article X were completely eliminated, which is a clear indication of an intent on the part of the contracting parties to protect these veterans against *loss of severance pay* by reason of their enforced absence in the military service.

And this was done to bring the provisions of the contract into conformity with the Selective Training and Service Act.

The type of leave of absence provided for in Article VIII, paragraph 6, and in Article X of this union contract differ materially.

The leave of absence provided for in paragraph 6 of Article VIII (Exhibit C) referred to by the Court (which is paragraph 5 in Article VIII of the contract in effect October 1940 to October 1942, being Ex. B)

is a voluntary leave — *by written agreement* between the publisher and the employee — strictly for the convenience and pleasure of the employee and, quite properly, time spent on such leave should not be included in computing severance pay. *It applies only to the non-veteran.*

The leave of absence provided for in Article X of the union contract is not a voluntary leave — but an involuntary one. The article says in no uncertain terms that an employee who leaves his job "to serve in the Armed Forces of the United States * * * *shall be granted a leave of absence*," and further provides that such leave shall be *with severance pay rating unimpaired.*" *And it applies only to the veteran.*

At page 3 of the opinion of this court it is said, after stating appellee's contentions,

> "However, an adjustment of appellee's rights in accordance with the mandate of the law and the provisions of Article X of the contract which require time spent in the armed services to be considered furlough time, does not *impair* their severance-pay rights."

The opinion (p. 3) goes on to state:

> "It is argued that unless the contract be so interpreted as to permit appellees' time in the Armed Services to be considered as full-time employment, said contract conflicts with Sec. 8(a) of the Selective Service and Training Act and is against public policy. Such a contention is dia-

> metrically opposed to the plain reading of Sec. 8(c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence."

The Court, by this language, has misconceived our position in this respect, because it ignores the fact that the rule as to *leave of absence for military service* was in effect at the time of induction of appellees. Our contention is that had the phrase "except that such leave may be deducted in computing severance pay" not been eliminated from the new Article X, it would conflict with the law and be against public policy.

This Court's construction of the law is hardly in accord with the view of the United States Supreme Court, for, at p. 287 in the *Fishgold* case, supra, the Court there said:

> "Section 8(c) of the Act recognizes that insurance and other benefits may continue to accrue to an employee on furlough or on leave of absence. An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be restored to work under specified conditions."

And at p. 289:

> "Our construction of the Act finds support in the legislative history. Representative May had charge of the bill on the floor of the House. He explained an amendment to Sec. 8(c) which add-

ed the words 'shall be considered during the period of service in such forces as on furlough or leave of absence' and also elaborated the clause dealing with 'insurance and other benefits.' He said:

> " 'I may say that the chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they are in the service and *they will even be permitted to count this time on the question of their retirement.* 86 Cong. Rec. 11702'."

"And before that amendment the Committee Report of the Senate stated:

> " 'The Congress, in this bill, has declared as its purpose and intent that every man who leaves his job to participate in this training and service should be re-employed without loss of seniority, or other benefits, upon his return to civil life. S.Rep. No. 2002, 76th Cong. 3rd Sess. p. 8'."

Having seen that Articles VIII and X of the union contract cover entirely *different kinds of leave* and that Article X specifically provides that the employees who "*leave their jobs to serve in the armed forces of the United States * * * shall be granted a leave of absence*" and upon their honorable discharge from active service or duty "shall then be reinstated to the same or comparable position *with severance-pay rating and other rights* unimpaired," it is inconceivable

that the parties to the contract had in mind the penalizing of the veteran by not permitting him to count the years he shouldered a gun in the defense of his country under the provisions of an entirely different type of leave provided for in paragraph 6 of Article VIII.

Is no siginficance whatever to be attached to the deliberate elimination from Article X contained in the 1940-1942 contract of the words "*except that such leave* (military) *may be deducted in computing severance pay*" in the new Article X (Ex. C)?

It would seem clear that the elimination of these words in the subsequent contract containing the new Article X was a forthright promise to these employees that time spent by them in the armed services *would* be considered as "full-time continuous employment by the Seattle Star" as provided in paragraph 4 of Article VIII in computing severance pay. What possible purpose could be served by the elimination of these clear, distinct and understandable words, than the one suggested. It is tantamount to saying, as the Supreme Court of the United States so clearly said with respect to Section 8(c) of the law, in the *Fishgold* case:

> "* * * *his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence.*"

A somewhat similar question, involving vacation pay was considered by the Circuit Court of Appeals for the Third Circuit in the case of *Mentzel v. Diamond* et al, 167 F. (2d) 299.

That case had to do with the question of whether in considering vacation pay the time spent by the veteran in the army should be included in computing the years of service with the employer in determining the number of weeks' vacation the veteran would be entitled to under Sec. 4(a) of the union contract with the employer.

Sec. 4(a) of the contract there involved read:

> "Employees shall receive vacation of one week with pay after one year's service; vacations of two weeks with pay after five years of service * * *."

In reversing the District Court, which refused to count the veteran's army service as being within the phrase "after five years' service * * *" (it appearing from the footnote that the veteran was first employed either in September, 1940, or January, 1941) and it further appearing from the opinion itself that the veteran was inducted into the United States Army on February 17, 1943, and after his honorable discharge was reinstated in his employment on October 22, 1945, and allowed but one week's vacation pay, the Circuit Court of Appeals said (p. 300):

"If Mentzel is entitled to count the period from the beginning of his employment with the company, including the time he spent in the Army, as 'service' he was entitled to two weeks' vacation with pay in 1946.

"If he is not entitled to count the time spent in the army as 'service' with the employer under the terms of this contract, he has received, in his one week's vacation with pay, all that he is entitled to. The latter is the position taken by the learned District Court and upon that basis he gave judgment for the defendant.

"The precise point seems to be new in this Circuit and elsewhere. But we think that the principle on which our own previously decided cases has been rested is sufficient to show what we think should be the answer here. In *Gauweiler v. Elastic Stop Nut Corporation*, 3 Cir., 1947, 162 F. (2d) 448, we examined the decisions of the Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*, 1946, 328 U.S. 275, 66 S.Ct. 1105, 90 L.Ed. 1230, 167 ALR 110, and *Trailmobile Co. v. Whirls*, 1947, 331 U.S. 40, 67 S.Ct. 982.

"We concluded that the analysis of the Supreme Court meant 'that what the Act gives to the veteran is the right not to lose his position or seniority by virtue of his absence in Military or Naval Service.' He is protected, while away, to the same extent as if he had been either continuously on the job in the plant or away on furlough or leave of absence for some personal reason."

Continuing, on p. 301, the Court said:

"Again, in *MacLaughlin v. Union Switch and Signal Company*, 3 Cir. 1948, 166 F. (2d) 46, 48, we read: * * * 'We can see no reason why the

> protection of the Selective Training and Service Act of 1940 in appropriate cases should not embrace vacation rights which the employee has earned and would have received as a matter of course but for his induction, * * * the statute was intended to place veterans on the precise point of the vacation escalator which they would have occupied had they kept their positions continuously during the war * * *'."

This same principle applies with equal force to severance pay under the contracts in the instant case.

For the foregoing reasons and upon the authorities cited we respectfully pray that the decision rendered in this case be reconsidered or that a rehearing be granted to the end that this Court may give to the statute in this case the liberal construction which the Supreme Court and the Third Circuit have said should be applied in such situations.

Respectfully submitted,

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